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No. 15-497

In The
Supreme Court of the United States

STACY FRY, BRENT FRY, E.F., a minor,
by her next friends, Stacy Fry and Brent Fry,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS,
PAMELA BARNES, AND JACKSON COUNTY
INTERMEDIATE SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The Individuals with Disabilities Education Act ("IDEA") requires a party to exhaust the IDEA's administrative procedures before filing a civil action under a different statutory scheme, if relief is "also available under [the IDEA]." Petitioners have filed suit under the Americans with Disabilities Act and Rehabilitation Act relating to an educational accommodation they requested as part of their daughter's special education program. The issue presented is:

> Whether Petitioners were required to exhaust Individuals with Disabilities Education Act administrative procedures regarding a dispute over the accommodation requested during an IEP team meeting, where the requested accommodation is educational in nature, and can be remedied to some degree by IDEA procedures.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
RELEVANT STATUTORY AND REGULATORY PROVISIONS	1
STATEMENT OF THE CASE	1
FACTS	1
PROCEDURAL HISTORY	4
REASONS TO DENY THE PETITION	6
I. The Individuals With Disabilities Education Act	9
A. The IDEA	9
B. Remedies Available Under IDEA	13
II. The IDEA Requires Petitioners To Exhaust Administrative Remedies If The Relief Sought Can Be Redressed By Any Degree, Even If The Petitioners Are Only Seeking Monetary Damages	15
A. Exhaustion Of Administrative Remedies Serves Important Policy Purposes	17
III. There Is No Conflict Among The Circuits	19

TABLE OF CONTENTS – Continued

Page

A. The Circuits Uniformly Prevent Plaintiffs From Avoiding The IDEA's Exhaustion Requirement Merely By Limiting A Prayer For Relief To Money Damages 20

B. The Ninth Circuit's Decision In *Payne v. Peninsula School District* Also Prohibits Plaintiffs From Avoiding Exhaustion Through Artful Pleading 24

C. This Case Would Not Be Decided Differently Under Petitioners' Reading Of *Payne v. Peninsula School District* 28

D. Relief Is Still Available Under IDEA Although Petitioners Voluntarily Left The School District To Avoid Exhaustion 31

IV. This Case Does Not Warrant Review 34

CONCLUSION 36

APPENDIX

Petitioners' Complaint ..... Resp. App. 1

20 U.S.C. §1400 ..... Resp. App. 23

20 U.S.C. §1401 ..... Resp. App. 30

34 C.F.R. §300.34 ..... Resp. App. 49

34 C.F.R. §300.39 ..... Resp. App. 56

34 C.F.R. §300.43 ..... Resp. App. 58

TABLE OF AUTHORITIES

Page

CASES

Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 403 (2014) 35, 36

A.W. v. Jersey City Pub. Schs., 486 F.3d 791 (3d Cir. 2007) 20

Cave v. East Meadow Union Free School District, 514 F.3d 240 (2d Cir. 2008) 12, 22

Charlie F. v. Board of Educ. of Skokie, 98 F.3d 989 (7th Cir. 1996) 22

Crocker v. Tennessee Secondary School Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989) 17, 18

Cudjoe v. Indep. Sch. Dist. # 12, 297 F.3d 1058 (10th Cir. 2002) 21, 23, 33

F.H. ex rel. Hall v. Memphis City Schools, 764 F.3d 638 (6th Cir. 2014) 24

Frazier v. Fairhaven Sch. Comm., 276 F.3d 52 (1st Cir. 2002) 17, 18, 20, 24, 33

Fry v. Napoleon Community Schools, 788 F.3d 622 (6th Cir. 2015) 21, 28, 33

J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107 (2d Cir. 2004) 20

Long v. Dawson Springs Ind. Sch. Distr., 197 Fed. Appx. 427 (6th Cir. 2006) 32

Muskrat v. Deer Creek Public Schools, 715 F.3d 775 (10th Cir. 2013) 24, 35

N.B. by D.G. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376 (11th Cir. 1996) 20, 34

TABLE OF AUTHORITIES – Continued

Page

Payne v. Peninsula School Dist., 653 F.3d 863 (9th Cir. 2011) ..... *passim*

Polera v. Board of Ed. of Newburgh, 288 F.3d 478 (2d Cir. 2002) 33

Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359 (1985) 14, 30, 31, 32

Smith v. Robinson, 468 U.S. 992 (1984) 15, 18

STATUTES

20 U.S.C. §1400, et seq. 9

20 U.S.C. §1400(d)(1)(A) ..... *passim*

20 U.S.C. §1400(d)(1)(B) 13

20 U.S.C. §1401(9) 3, 10

20 U.S.C. §1401(19) 2

20 U.S.C. §1401(26) 11

20 U.S.C. §1401(34) 12

20 U.S.C. §1412(a)(4) 2

20 U.S.C. §1414(d)(1)(B) 2

20 U.S.C. §1415(b)(6) 13

20 U.S.C. §1415(f)-(g) 3, 4, 13, 15

20 U.S.C. §1415(f)(3) 4

20 U.S.C. §1415(f)(3)(A) 14, 18

20 U.S.C. §1415(f)(3)(D) 14, 18

20 U.S.C. §1415(l) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. §14012(a)(4) 10

MCL 388.1709 3

REGULATIONS

34 C.F.R. §300.1, et seq. 9

34 C.F.R. §300.34 11

34 C.F.R. §300.34(7) 25

34 C.F.R. §300.34(7)(i) 11

34 C.F.R. §300.34(7)(ii) 2

34 C.F.R. §300.34(7)(ii)(B) 7, 12, 28

34 C.F.R. §300.34(16) 12

34 C.F.R. §300.39 12

34 C.F.R. §300.39(a) 10, 28

34 C.F.R. §300.39(a)(2) 10

34 C.F.R. §300.39(b)(4)(ii) 2, 10, 28

34 C.F.R. §300.43 12

34 C.F.R. §300.320(b) 12

34 C.F.R. §300.510(b) 18

34 C.F.R. §300.515(b) 4

Michigan Administrative Rule 340.5 3

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985) 16, 22

Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (Spring 2007) 18

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant portions of the Individuals with Disabilities Education Act and Title 34. Education of the Code of Federal Regulations are reprinted in the appendix to this brief. Petitioners reprinted the Handicapped Children's Protection Act of 1986 in their Petition at App. 55.

STATEMENT OF THE CASE

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415(l), expressly requires families to exhaust IDEA administrative remedies before filing suit under other laws, such as the ADA or Rehabilitation Act, if they could also obtain relief under the IDEA. Petitioners brought suit under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act relating to dispute over an educational accommodation they requested during a meeting to amend their daughter's Individualized Education Program.

FACTS

E.F. is a 12-year-old, former student at Napoleon Community Schools and Jackson County Intermediate School District.[1] Record Entry 1, Page ID 1, ¶2.

[1] E.F. attended Napoleon Community Schools. Napoleon Community Schools is one of twelve constituent public school

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E.F. is diagnosed with multiple medical conditions. As a result, while attending Respondents' schools, E.F. was eligible for and received special education services under the IDEA, 20 U.S.C. §1400, et seq. *Id.* at Page ID 4, ¶19. E.F. received special education services through her Individualized Education Program ("IEP").[2] *Id.* at Page ID, ¶33.

In the fall of 2009, Petitioners requested that the Respondents allow a service animal named "Wonder" to accompany E.F. at school. *Id.* at Page ID 6, ¶¶32-33. Petitioners "'requested a service dog for their daughter to enhance her independence.'" *Id.* at ¶33. Enhancing independence is a stated goal of special education under the IDEA. 20 U.S.C. §1400(d)(1)(A). A request for a disabled student "[t]o use . . . a service animal" is also a specifically identified IDEA "related service," 34 C.F.R. §300.34(7)(ii), and a form of "travel training" under the IDEA. 34 C.F.R. §300.39(b)(4)(ii).

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districts of Jackson County Intermediate School District ("The JCISD"). The JCISD provides special education support for all schools in Jackson County.

[2] Under the IDEA, the IEP is the central means by which a school district provides special education services to disabled students. 20 U.S.C. §1412(a)(4). The IEP is, in brief, a comprehensive statement of the educational needs of a handicapped child, and the specially designed instruction and related services to be employed to meet those needs. 20 U.S.C. §1401(19). IEPs are created by IEP teams, which include teachers, administrators, parents, and medical professionals. 20 U.S.C. §1414(d)(1)(B). IEP teams convene to discuss the disabled student's individual needs, and based on these discussions, develop an IEP that is individually tailored to the unique needs of the particular student.

In January 2010, the School convened an IEP team meeting to consider E.F.'s need for a service animal. *Id.* at Page ID 6, ¶32. Petitioners claim that the purpose for requesting the dog was examined during the IEP meeting, but "the request was denied because the IEP team determined that E.F.'s 'physical and academic needs are being met through the services/programs/accommodations of the IEP.'" *Id.* at Page ID 6, ¶33. Members of the IEP team believed that the human aide the school provided as part of her IEP satisfied E.F.'s needs. Petitioners claim that the denial of this IDEA service resulted in E.F.'s home-schooling. *Id.* at Page ID 2, 6, ¶¶6, 34-35. This is, in essence, an allegation that E.F. was prevented from receiving a free appropriate public education ("FAPE"). *See* 20 U.S.C. §1401(9). Respondent Jackson Intermediate School District remained responsible for providing special education services to E.F. while she was homeschooled. *See* MCL 388.1709; Michigan Administrative Rule 340.5.

Petitioners, who were represented by legal counsel at the time, concede that they never exhausted their IDEA procedures by requesting an impartial due process hearing relating to their request. *See* 20 U.S.C. §1415(f)-(g). Petitioners instead filed a complaint with the Office of Civil Rights ("OCR").[3]

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[3] Filing a complaint with OCR does not satisfy IDEA exhaustion requirements. *See* 20 U.S.C. §1415(f)-(g). It is not the state or local *educational* agency identified in the IDEA. The purpose of an OCR investigation is different than that of the

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Ultimately, OCR took more than two years to complete its investigation.

The dispute whether Wonder could accompany E.F. to school continued for nearly three years without Petitioners utilizing IDEA procedures. Had they done so, the dispute could have been resolved in less than 105 days. 20 U.S.C. §1415(g); 34 C.F.R. §300.515(b). Most, if not all, of the alleged harm could have been avoided during that timeframe.

Ultimately, Petitioners enrolled E.F. in a different school district for the 2012/2013 school year.

PROCEDURAL HISTORY

On December 17, 2012, Petitioners filed suit relating to accommodations specifically requested during E.F.'s specially convened January 2010 IEP. The lawsuit claimed that E.F. was denied the accommodation requested during the IEP meeting. Record Entry 1, Page ID 6, ¶¶32,33. Petitioners filed suit "seeking damages for the school's refusal to accommodate Wonder between Fall 2009 and Spring 2012," the entire period of time Respondent Jackson County Intermediate School District was responsible for

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impartial due process hearing procedure under the IDEA. OCR also does not provide "special education experts" to preside over disputes. 20 U.S.C. §1415(f)(3). Thus, the Court would not receive the same benefit of expert fact-finding from OCR as it would from the state agency.

providing special education services to EF. In their lawsuit, and contrary to Petitioners' current claim, Petitioners specifically requested "***any***" relief the Court determines appropriate. *Id.* at Page ID 16, ¶E.

On January 10, 2014, the District Court dismissed Petitioners' lawsuit for failing to exhaust IDEA procedures before filing suit. On June 12, 2015, the Sixth Circuit affirmed the dismissal in a split decision. The Majority Opinion found that §1415(l) requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA. The Majority then held that the IDEA exhaustion requirement applies to Petitioners' claim because the core harms in their lawsuit alleged relate to the specific educational purpose of the IDEA, and therefore could be redressed by some degree by the IDEA's procedures.

On June 26, 2015, Petitioners requested *en banc* review. Petitioners claimed that the Majority Opinion was incorrect because Petitioners sought "only compensatory damages for the social and emotional harm caused by the School" that were not available under the IDEA. Petitioners' Complaint, however, clearly requested "any" relief the Court determines appropriate, which includes injunctive relief available under the IDEA. On August 5, 2015, the request for rehearing *en banc* was denied.

REASONS TO DENY THE PETITION

The IDEA expressly requires families to exhaust administrative remedies under the IDEA before filing suit under other laws, such as the ADA or Rehabilitation Act, if they could also obtain relief under the IDEA. 20 U.S.C. §1415(l).

Every circuit interpreting §1415(l) has held that families raising grievances relating to the education of disabled children are required to exhaust administrative remedies before filing suit in federal court if the IDEA can provide some remedy. This is true even if their claims are formulated under a statute other than the IDEA, such as the ADA or the Rehabilitation Act. To determine whether relief is available, these circuit courts have consistently looked to the nature of the plaintiff's factual complaints and injuries; not just the wording of the relief requested. If the core harms alleged relate to the specific educational purpose of the IDEA, then relief is available under the IDEA, and the family must exhaust the administrative remedies before filing a lawsuit. These circuits have all held that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by artfully limiting a prayer for relief to money damages. This is true even though the IDEA does not allow for an award of general money damages.

Petitioners' request for review is based on the false premise that a single decision from the Ninth Circuit, *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011), establishes a circuit split when

exhaustion is required. There is no circuit split. Contrary to Petitioner's assertion, this single decision is no different in substance than the other circuits. *Payne* still requires families to exhaust administrative remedies under the IDEA, even if they bring suit under a different statute, such as the ADA or the Rehabilitation Act. 653 F.3d at 875. *Payne* also calls for an examination of the nature of the claims to determine whether IDEA administrative procedures must be pursued. *Id.* at 880. *Payne*, in fact, found that lawsuits arising from the denial of a free appropriate public education must be exhausted, no matter how they are pled, and no matter what relief was expressly requested. *Id.* And like every circuit to address the issue, *Payne* finds that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages, as Petitioners have advocated. *Id.* at 877.

Petitioners were required to exhaust IDEA administrative procedures in this case because their "claim arises only as a result of a denial of a FAPE." *Payne*, 653 F.3d at 877. The dispute here relates to Petitioners' request to amend E.F.'s IEP, allowing her access to a special education "travel training," and a "related service" expressly identified in the IDEA. 34 C.F.R. §300.34(7)(ii)(B). Petitioners also claim this "travel training" and "related service" was requested to help E.F. develop independent living skills, a stated goal of the IDEA. 20 U.S.C. §1400(d)(1)(A). Petitioners claim that the implementation of this educational program for E.F. absent the dog resulted

in impeding E.F.'s educational goal of developing independence, and ultimately denied her an education in that school building. These are the exact situations the IDEA administrative procedures are designed to address: disputes over requests for related services made during an IEP conference, and determinations whether a disabled student should have access to a specific special education curriculum of a "related service" to foster independent living.

The alleged "conflict" among circuits does not warrant review by this Court. The defendant school district in *Payne* sought certiorari in 2011, also claiming that *Payne* created a circuit split. This Court denied the Petition. Since that 2011 Petition was denied, only a few circuits have been confronted with the issue of exhaustion under the IDEA. Every circuit since *Payne* has examined the substance of the plaintiffs' claim to determine whether exhaustion was required, as held by the First, Second, Third, Sixth Seventh, Tenth, and Eleventh Circuits – and *Payne*. No circuit since *Payne* has relied exclusively on the relief requested in the pleadings to determine whether exhaustion was required. Nor has any circuit allowed a plaintiff to artfully plead money damages only to avoid the IDEA's exhaustion requirement. In sum, no circuit court cases have relied on *Payne* in the manner Petitioner interprets this decision.

I. The Individuals With Disabilities Education Act

Petitioners argue that exhaustion of IDEA administrative procedures is not required in this case because "E.F. did not seek an IDEA remedy or its functional equivalent, seek prospective relief to alter her IEP or educational placement, or raise any claim that relied on the denial of a free appropriate public education." *See* Page 17 of Petition. Petitioners appear to concede that exhaustion would have been required had E.F. raised one of the above claims. E.F. had in fact raised all three claims.[4] Petitioners' assertion that such relief was not requested is based on a misunderstanding of the IDEA, and what remedies are available under the IDEA.

A. The IDEA

The IDEA is the federal statutory scheme that governs the education of disabled students. 20 U.S.C. §1400, et seq.; 34 C.F.R. §300.1, et seq. The core purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. §1400(d)(1)(A). The term free appropriate public education ("FAPE") is comprised of two elements, 1) special education,

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[4] Contrary to Petitioner's assertion, this lawsuit arises from their request to alter E.F.'s IEP on January 10, 2010, seeks "any" relief the court determines is appropriate, and alleges she was denied an element of a FAPE.

and 2) related services. 20 U.S.C. §1401(9). Needless to say, a disabled student has been denied a FAPE if a school fails to provide either an appropriate education, or a needed related service. Disabled students receive their special education curriculum and related services through their IEP. 20 U.S.C. §14012(a)(4).

It is important to note that FAPE (and, thus, "special education" and "related services") encompasses more than simply academics. The IDEA's goal is that disabled students receive a special education curriculum and related services that are "designed to meet their unique needs and prepare them for further education, employment, **and independent living**." 20 U.S.C. §1400(d)(1)(A) (emphasis added).

"Special education" is defined, in part, as a specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. 34 C.F.R. §300.39(a). In light of the above goal, special education is also defined as pathology services, vocational training, and "travel training." *Id.* at §300.39(a)(2). "Travel training" is "instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community)." 34 C.F.R. §300.39(b)(4)(ii). Therefore, a request for a service

animal to assist E.F. to travel within the school building, to gain independence, is by definition part of her special education curriculum.

"Related services" is defined by the IDEA as an accommodation that allows a disabled student to benefit from special education. 20 U.S.C. §1401(26); 34 C.F.R. §300.34. Related services help children with disabilities benefit from their special education by providing extra help and support in needed areas, such as speaking or moving.

The scope of "related services" is expansive. The IDEA expressly states that related services can include, but are not limited to, any of the following: speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; medical services for diagnostic or evaluation purposes; school health services and school nurse services; social work services in schools; parent counseling and training; and transportation.

Of particular importance to Petitioners' claim, the IDEA also defines "related services" as "orientation and mobility services." 20 U.S.C. §1401(26). Orientation and mobility services are used to "attain systemic orientation to and safe movement with [the student's] environments in school, home, and community." 34 C.F.R. §300.34(7)(i). The IDEA expressly

provides that teaching a disabled child to use a "service animal" is an IDEA orientation and mobility related service. *Id.* at §300.34(7)(ii)(B). "Transportation" related services is defined as assistance with "travel in and around school buildings." *Id.* at §300.34(16). Thus, Petitioners' request for a service animal to assist E.F. with travel around the school is within the scope of the definition of a FAPE. This fact warrants the denial of Petitioners' claim.

The IDEA also requires schools to provide disabled students "transition services," which is a curriculum or related service to prepare them for "post-school activities" and "independent living." 20 U.S.C. §1401(34); 34 C.F.R. §300.39, §300.43, §300.320(b) (requiring transition planning begin at the earliest age appropriate, and no later than age 14). For each student with a disability, the IEP must include a statement of the student's transition service needs that focuses on the student's particular needs. *Id.* Thus, the IEP team must determine what instruction, related services, and educational experiences will help the student prepare for the transition from school to adult life. For example, if a student's transition goal is to secure a job, a transition service need might be enrolling in a career development class to explore career options and specific jobs related to that career. As another example, the Second Circuit found that, under the IDEA, access to an "independent life tool" such as a service dog "is not entirely beyond the bounds of the IDEA's educational scheme." *Cave v. East Meadow Union Free School District*, 514 F.3d 240 (2d Cir. 2008).

Therefore, under the IDEA, a request for a service animal to assist a disabled student is: part of a special education curriculum related to "travel training"; a "related service," to help a disabled student benefit from a special education curriculum while in school; a related service to promote independence at home and in the community; and a transition service to prepare a disabled student for "post-school activities" and "independent living." Thus, Petitioners' request in this case directly relates to E.F.'s access to a FAPE.

B. Remedies Available Under IDEA

Another stated purpose of the IDEA is to ensure "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §1400(d)(1)(B). The IDEA provides recourse to disabled students who are denied an education or related service.

To ensure that children with disabilities are being afforded all of the educational benefits of the statute, the IDEA provides parents with an opportunity to lodge formal complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* at §1415(b)(6). A complaining parent has recourse to an impartial due process hearing conducted by either the local or state educational agency, *Id.* at §1415(f), and the right to appeal any finding or decision reached in the hearing. *Id.* at §1415(g).

The IDEA administrative procedure requires that each due process proceeding is administered by an expert in special education laws and issues. 20 U.S.C. §1415(f)(3)(A). During a due process hearing, the special education expert is charged with developing a detailed factual record using the hearing officer's expertise in special education. 20 U.S.C. §1415(f)(3)(D). This is in contrast to the Office of Civil Rights investigation, which does not require the involvement of special education experts.

If it is determined that a school has failed to meet its obligations to a disabled student, the IDEA permits wide ranging remedies. This Court has found that the statutory scheme allows such relief as is "appropriate" for violations. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-370 (1985). This Court also determined that the IDEA requires the exercise of "broad discretion" to order an appropriate remedy. *Id.* at 369. As a result, Courts have approved and ordered wide ranging remedies for denials of FAPE under the IDEA. Such IDEA remedies have included: (1) tuition reimbursement to attend a different school; (2) compensatory education; (3) prospective revisions of the IEP; (4) prospective placement; (5) evaluations; and (6) travel expenses to a new school. This Court has also affirmed a due process hearing officer's order requiring a school to provide compensatory services to one of its *former* students. *Id.*

II. The IDEA Requires Petitioners To Exhaust Administrative Remedies If The Relief Sought Can Be Redressed By Any Degree, Even If The Petitioners Are Only Seeking Monetary Damages.

Petitioners' claim relates to whether E.F. was required to exhaust the administrative procedures in §1415(f)-(g) before filing suit in federal court. In 1986, Congress addressed the IDEA's exhaustion requirement by amending 20 U.S.C. §1415(l). The Amendment was in response to the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* found that the IDEA was "the exclusive avenue through which" claims related to special education could be asserted.

When Congress enacted §1415(l), its intent was to confirm that the IDEA did not preempt all claims involving disabled children. Under the Amendment, aggrieved families could still maintain claims under "other Federal laws protecting the rights of children with disabilities." But contrary to Petitioner's claim, Congress did **not** propose to eliminate the IDEA exhaustion requirement when families bring suit under a different legal theory.

To the contrary, when drafting §1415(l), Congress reaffirmed the importance of the exhaustion requirement. Congress clarified that it still intended for families to exhaust IDEA administrative procedures before filing suit on behalf of a disabled child if the claim was educational in nature, no matter the legal

theory. This intent is confirmed in the House Committee notes to the Amendment, which state: "a parent is required to exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985).

Ultimately, while §1415(l) permits other federal claims, the Amendment requires families to exhaust IDEA administrative remedies before filing suit under other laws if they could also obtain relief under the IDEA:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA] . . . , [§504] . . . , or other Federal laws protecting the rights of children with disabilities, **except before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]**, the [administrative appeal] procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

Thus, if the IDEA can provide relief regarding a disabled student's claim, the student must use the IDEA's administrative procedures first, even if the student invokes a different statute.

Section 1415(l) does not absolve school districts of civil liability for injuries which could not be remedied or palliated by IDEA's related services. Instead, it codifies a recognition that the education of disabled children is a complex endeavor, calling for much individual attention, and that a misjudgment in a child's IEP – or a mistake in execution of that plan – can result in unexpected academic and psychological injuries. For that reason, in cases where both the genesis and the manifestations of the problem are educational, §1415(l) requires potential plaintiffs first to give school districts the opportunity to correct the effects of their claimed educational mistakes under the IDEA's administrative process, before recasting claims arising from acts or omissions related to educational efforts as violations of constitutional and statutory rights, with compensation sought in money damages.

A. Exhaustion Of Administrative Remedies Serves Important Policy Purposes

Over the years, circuit courts have found that the policies underlying this exhaustion requirement are both sound and important. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002); *Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). Exhaustion meets Congress' view "that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's

education." *Crocker*, 873 F.2d at 935, citing *Smith v. Robinson*, 468 U.S. at 1012.

Exhaustion also provides an enormous benefit to the Court. *Crocker*, *supra*. The IDEA recognizes that federal courts are generalists with no expertise in special education matters. *Crocker*, 873 F.2d at 935. Therefore, courts are ill-equipped to act as fact-finders in the first instance in matters relating to special education. *Id.* In contrast, the IDEA administrative procedure provides courts with expert fact-finding by a specialist in special education laws and issues. 20 U.S.C. §1415(f)(3)(A); §1415(f)(3)(D). This expert fact-finding provides courts with an enormous benefit. *Crocker*, 873 F.2d at 935. As the First Circuit recognized in *Frazier*, "[t]his [approach] makes sense because the problems attendant to the evaluation and education of those with special needs are highly ramified and demand the best available expertise." 276 F.3d at 61.

IDEA administrative procedures also provide aggrieved students and their families with an enormous benefit, namely an expedited and cheaper manner to resolve injuries arising from educational disputes. Disputes regarding an IEP accommodation could be resolved within 105 days of the initial complaint, with a fully developed factual record. 34 C.F.R. §300.510(b). According to one study, the average duration of due process proceedings filed between 2000 and 2006 lasted only 52 days. Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings?*

An Exploratory Study, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (Spring 2007).

Far from penalizing disabled students, §1415(l) provides a fast, efficient way to redress such injuries as an alternative to civil litigation, which may drag on for years. So long as plaintiffs exhaust their IDEA remedies, nothing prevents them from subsequently bringing civil claims based upon violations of constitutional or statutory rights. This case perfectly embodies the benefit the IDEA administrative process provides. Had Petitioners filed a due process hearing request early on, the issue regarding the service dog could have been resolved before the start of the 2010/2011 school year. Instead, they chose to file a federal lawsuit that has now languished for six years since the accommodation request.

III. There Is No Conflict Among The Circuits.

The Sixth Circuit found that Petitioners had to exhaust these procedures before filing suit, no matter the relief artfully requested, or the legal theory pursued, because Petitioners' claims are educational in nature. Petitioners claim that the Sixth Circuit's holding is in accord with nearly every circuit to address the exhaustion issue under §1415(l). Petitioners assert, however, that the circuits conflict with an outlier opinion from the Ninth Circuit, *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011). When comparing the substance of these circuits' opinions with *Payne*, there is no conflict.

A. The Circuits Uniformly Prevent Plaintiffs From Avoiding The IDEA's Exhaustion Requirement Merely By Limiting A Prayer For Relief To Money Damages.

Indeed, the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits agree when exhaustion under §1415(l) is required. These circuits are unanimous that families raising grievances relating to the education of disabled children are required to exhaust their administrative remedies before filing suit in federal court, even if their claims are formulated under a statute other than the IDEA, such as the ADA or the Rehabilitation Act. *See, e.g., J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112 (2d Cir. 2004).

These circuit courts have all held that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by artfully limiting a prayer for relief to money damages. This is true even though the IDEA does not allow for an award of general money damages. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002) (holding families "who bring an IDEA-based claim under 42 U.S.C. § 1983, in which they seek ***only*** money damages, must exhaust the administrative process available under the IDEA as a condition precedent to entering a state or federal court."); *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) ("The plaintiff argues there is no point pursuing administrative remedies because the defendant school districts lack

authority to grant the relief requested, namely money damages. Again, if the plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant. This goes against the very reason that we have the exhaustion requirement, which is '[to prevent] deliberate disregard and circumvention of agency procedures established by Congress.'").

IDEA administrative procedures must be exhausted if some form of relief is available under the IDEA. To determine whether relief is available, these circuit courts have consistently looked to the gravamen of the plaintiff's factual complaints and injuries; not just the careful wording of the relief requested. If the core harms alleged relate to the specific educational purpose of the IDEA, then relief is available under the IDEA, and the family must exhaust the administrative remedies before filing a lawsuit. Some circuits have used different language to describe the test, whether it is "theory of the grievance," "core harm alleged," or "genesis and manifestation of the injury." Regardless of the nomenclature, each circuit requires plaintiffs to pursue IDEA administrative procedures if the substance of the disabled student's claims is educational in nature, no matter the express relief sought. *See, e.g.*, *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015); *Cudjoe v. Indep. Sch. Dist. # 12*, 297 F.3d 1058, 1066 (10th Cir. 2002) ("[T]he dispositive question generally is whether the plaintiff has alleged injuries that could be redressed

to any degree by the IDEA's administrative procedures and remedies."); *Cave v. East Meadow Union Free School District*, 514 F.3d 240, 248 (2d Cir. 2008) (requiring exhaustion because under the IDEA, access to an "independent life tool" such as a service dog "is not entirely beyond the bounds of the IDEA's educational scheme"); *Charlie F. v. Board of Educ. of Skokie*, 98 F.3d 989, 993 (7th Cir. 1996) ("Both **the genesis and the manifestations of the problem are educational**; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.").

These circuit courts' holdings are consistent with the Legislative intent behind §1415(l), which required parents to "exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985). Requiring exhaustion when complaints "involve" FAPE confirms the drafter's intention to examine the nature of the claim, not just superficially examining the specific relief requested in the pleadings.

These decisions are also consistent with the plain language of §1415(l). The relevant portion of this statute reads:

> before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [administrative appeal]

> procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

The statute does not require that "*the* relief requested" must also be available, where "the" would refer to a specific form of relief. Nor does the statute require that "*all* relief requested" must also be available under the IDEA. And as the Tenth Circuit acknowledged, "the word 'available' appears in the statute unqualified with other conditions, such as that the relief must be 'immediately' or 'currently' available." *Cudjoe*, 297 F.3d at 1067. The statute only states exhaustion is required when families are "seeking relief that is also available," without any modifiers preceding "relief" or "available." Without the modifiers such as "the" or "all," §1415(l) requires exhaustion if *some form* of relief is also available under the IDEA.

Had Congress intended to limit the exhaustion requirement in the manner Petitioners request, certainly Congress would have added additional language to the statute. The additional language would expressly restrict exhaustion only to circumstances when *all of the relief a plaintiff expressly requests* is also available under the IDEA. Absent such express language, the only reasonable interpretation of §1415(l) is to require families to utilize IDEA administrative procedures if some form of remedy can also be provided by the IDEA, regardless of the type of relief specifically sought. And the only way to

determine whether "some form of relief" is available under the IDEA is by examining the nature of the claim; the "core harms alleged," the "theory of the grievance," the "genesis and manifestation" of the claim.

B. The Ninth Circuit's Decision In *Payne v. Peninsula School District* Also Prohibits Plaintiffs From Avoiding Exhaustion Through Artful Pleading.

The Ninth Circuit's decision in *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011) is no different in substance than the other circuits. *Payne* involved claims of mental and physical abuse of a disabled student caused by being physically restrained in a small closet.[5] This case, by contrast, relates to Petitioners' request made during an IEP conference for their daughter to have a type of

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[5] *Payne* would have been decided in the same manner in circuits interpreting the "core harms alleged" language. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (1st Cir. 2002); *F.H. ex rel. Hall v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014) (no exhaustion required for claim related to "non-educational injury" resulting from alleged abuse and neglect of disabled student while enrolled in district's schools); *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 784 (10th Cir. 2013) (exhaustion not required for physical abuse of disabled student because injury was not educational in nature). Contrary to Petitioners' argument, the "core harms" standard does not require disabled students to exhaust administrative remedies based solely on the coincidental facts that the student is disabled and injured in a school.

"related service" specifically identified in the IDEA to help E.F. develop independence. Record Entry 1, Page ID 6, ¶33; 20 U.S.C. §1400(d)(1)(A); 34 C.F.R. §300.34(7).

Consistent with the other circuits, the Ninth Circuit in *Payne* held that when a plaintiff seeks an IDEA remedy, administrative remedies must be exhausted. This is true even if the plaintiff's lawsuit is pled only as a Constitutional claim. *Payne* held:

> where a plaintiff is seeking to enforce rights that arise as a result of a denial of free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a [free appropriate public education] to provide the basis of the cause of action. . . . Such claims arise under either the IDEA . . . or its substantive standards (if a [Rehabilitation Act] claim is premised on a violation of the IDEA), so the relief follows directly from the IDEA and is therefore "available under this subchapter." 20 U.S.C. § 1415(l).

Payne, 653 F.3d at 875. *Payne* found that the exhaustion requirement was intended "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students." *Payne*, 653 F.3d at 876.

Relying on the language, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant – what matters is whether the plaintiff *actually* sought relief available under the IDEA,"

Petitioners argue that *Payne*'s approach focuses solely on the express relief requested in the complaint, while ignoring the nature of the injury alleged. Petitioners' interpretation of *Payne* is too narrow.

The *Payne* Court stated, "when determining whether the IDEA requires a plaintiff to exhaust, courts ***should start*** by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it ***is likely*** that § 1415(l) does not require exhaustion in that case." *Id.* at 876 (emphasis added). *Payne* does not end the inquiry with a mere review of the relief requested, as Petitioners have repeatedly suggested. In fact, *Payne* expressly rejected such an interpretation of its holding. *Id.* at 877.

As every circuit to address the issue, *Payne* requires an examination of the nature of the claims to determine whether IDEA administrative procedures must be pursued:

> where the claim arises only as a result of a denial of a FAPE, whether under the IDEA or the Rehabilitation Act, exhaustion is clearly required no matter how the claim is pled.

Id. at 880. As an example, *Payne* stated that "a disabled student's claim arising from a school district's implementation of an educational program that resulted in a claimed failure to adequately instruct in reading" must be exhausted using IDEA procedures, even if the disabled student is requesting monetary

damages in his lawsuit that are not available under the IDEA. *Id.* at 879-880. Under such a scenario, "the plaintiff *actually* sought relief available under the IDEA" by factually alleging the student was denied access to reading instruction, regardless of the relief expressly requested. *Id.* at 875. Based on *Payne*'s willingness to also examine the nature of the claims alleged to determine the need for exhaustion, there is no distinction between the circuits.

And consistent with every circuit, *Payne* also finds that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages as Petitioners have advocated:

> plaintiffs cannot avoid exhaustion through artful pleading. If the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling – relief available under the IDEA – then the IDEA requires exhaustion. . . . In other words, to the extent that a request for money damages functions as a substitute for relief under the IDEA, a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages.

Id. at 877. Based on this language, it does not matter under *Payne* what relief the plaintiff actually requested in their complaint. Consistent with every other circuit, claims that are educational in nature must first be exhausted using IDEA administrative procedures. *Id.* at 879-880. Underscoring the fact that

Payne stands in concert with the circuits in this regard, the Sixth Circuit in *Fry* cited to *Payne* in support of its majority holding. *Fry*, 788 F.3d at 631 ("the exhaustion requirement must apply when the cause of action "arise[s] as a result of a denial of a [FAPE]" – that is, when the legal injury alleged is in essence a violation of IDEA standards. *Payne*, 653 F.3d at 875.").

C. This Case Would Not Be Decided Differently Under Petitioners' Reading Of *Payne v. Peninsula School District.*

Payne still requires Petitioners to exhaust in this case because their "claim arises only as a result of a denial of a FAPE." *Payne*, 653 F.3d at 877. The dispute here relates to Petitioners' request to amend E.F.'s IEP, allowing her access to a special education "travel training" curriculum, and a "related service" expressly identified in the IDEA. 34 C.F.R. §300.39(a), (b)(4)(ii), §300.34(7)(ii)(B). Petitioners also claim this "travel training" and "related service" was requested to help E.F. develop independent living skills, a stated goal of the IDEA. 20 U.S.C. §1400(d)(1)(A). Here, a special IEP meeting was convened for the purpose of determining whether E.F.'s IEP should be amended to include the service animal. Respondents determined during the IEP meeting that those educational needs were already adequately served by her current "'services/programs/accommodations of E.F.'s IEP.'" Record Entry 1, Page ID 6, ¶33. Petitioners claim that the implementation

of this educational program for E.F. absent the dog resulted in impeding E.F.'s educational goal of developing independence, and ultimately denied her an education in that school building.

An allegation that a disabled student was denied a related service specifically identified in the IDEA is by definition a claim that the student was denied a FAPE. Petitioners' lawsuit is nearly identical to *Payne*'s example of an injury resulting from the failure to provide a reading accommodation. *Payne* found that such a case must be exhausted, even if the plaintiffs sought money damages not available under the IDEA. *Payne*, 653 F.3d at 879-880.

These are the exact situations the IDEA administrative procedures are designed to address: disputes over requests for related services or for a specific curriculum made during an IEP conference, and determinations whether a disabled student should have access to a specific special education curriculum or "related service" to foster independent living. Had Petitioners requested a due process hearing, the dispute over this accommodation would have likely been resolved before the start of the next school year. If it was resolved in Petitioner's favor, most if not all of the harm alleged would have been avoided. If Respondents had prevailed, Petitioners still could have sought its legal remedies in federal court.

In an effort to avoid exhaustion, Petitioners claim they were "principally" seeking money in their lawsuit, and were not concerned with correcting the

potential educational injury to E.F. p. 18. Relying on an incorrect interpretation of *Payne*, Petitioners claim they were not required to exhaust IDEA administrative procedures because some of the forms of relief they requested are not available under the IDEA. Under *Payne*, that argument does not avoid exhaustion. *Id.* at 877 ("a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages.").

Petitioners, in fact, actually sought forms of relief in their Complaint that were available under the IDEA. Petitioners expressly requested "***any***" relief the Court determines appropriate. Record Entry 1 Page ID 16, ¶E. This request compels Petitioners to exhaust under *Payne*, as the Ninth Circuit also stated that exhaustion applies in cases "where the relief sought by the plaintiff in the pleadings is available under the IDEA." 653 F.3d at 871. Petitioners' request necessarily encompasses all available relief under the IDEA. The IDEA would allow a number of potential remedies, including "prospective injunctive relief" should E.F. return to Respondents' schools, ordering Respondents to accept the dog; an order requiring the Schools to pay for compensatory/education services; reimbursement of past expenses, attorney fees and costs; all IDEA remedies. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-370, 105 (1985).

D. Relief Is Still Available Under IDEA Although Petitioners Voluntarily Left The School District To Avoid Exhaustion.

Petitioners also claim that relief is not available under the IDEA because E.F. chose to leave Napoleon Community Schools. The Supreme Court, however, has established that IDEA relief is still available to E.F., even though she now attends a different school. *See Sch. Comm. of Town of Burlington*, 471 U.S. at 369-370.

In *Burlington*, the respondent father of a handicapped child rejected the petitioner school's proposed IEP calling for placement of the child in a certain public school. 471 U.S. at 362. The father disagreed with the IEP and, at his own expense, enrolled the child in a private school. Meanwhile, the father sought review by Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). 471 U.S. at 362-363. After conducting multiple impartial due process hearings, BSEA ordered the school to pay the child's tuition and transportation to his new school. The *Burlington* Court determined whether these "belated" reimbursement costs were available remedies under the IDEA.

This Court affirmed the BSEA's order, and held that the respondent father was entitled to reimbursement of expenses, such as private school tuition and transportation costs, as a remedy under the IDEA. This IDEA remedy was available even though

his son no longer attended the respondent's school. The *Burlington* Court recognized that the EHCA – now IDEA – allows "such relief as [it] determines is appropriate," which requires the exercise of "broad discretion" to order an appropriate remedy. 471 U.S. at 369. With that guidepost, and germane to Petitioners' argument here, the Court held that appropriate remedies under the IDEA include the "belated" reimbursement of expenses after the student has already left the school district. *Id.* at 370-371. This Court reasoned that "[s]uch a *post hoc* determination of financial responsibility was contemplated in the legislative history" of the IDEA. *Id.* at 371.

Indeed, students may receive a wide range of remedies under the IDEA from a school the student formerly attended. This Court has found that common remedies that can be "belatedly" ordered include awards of compensatory education and services, reimbursement of costs, and attorney fees. *Burlington*, 471 U.S. at 369-370; *see also Long v. Dawson Springs Ind. Sch. Distr.*, 197 Fed. Appx. 427 (6th Cir. 2006) (holding that "[i]t is clear that the IDEA authorizes the award of funds to parents to reimburse them for expenses on special education that a school board should have, but did not, provide."). Directly related to Petitioners' claim, as a remedy available under the IDEA, Respondents could also be required to pay for E.F. to attend a different school district. *Id.* Such a remedy has included payment of tuition and travel costs. *Id.*

If Petitioners paid costs and attorney's fees for the two-and-a-half years from the time the accommodation was requested and E.F. moved schools, Petitioners could still recover those costs and fees. Since Respondent Jackson Intermediate School District remains E.F.'s home school district, conceivably Petitioners could seek the travel costs to attend a different school under the IDEA. In sum, Petitioners may still seek multiple "appropriate" remedies under the IDEA even though E.F. attends a different school.

Moreover, circuits addressing Petitioner's argument have unanimously held that a plaintiff cannot evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief. *Fry*, 788 F.3d at 630; *see also Frazier*, 276 F.3d at 63; *Polera v. Board of Ed. of Newburgh*, 288 F.3d 478, 490 (2d Cir. 2002) ("Plaintiffs should not be permitted to 'sit on' live claims and spurn the administrative process that could provide the educational services they seek, then later sue for damages. Were we to condone such conduct, we would frustrate the IDEA's carefully crafted process for the prompt resolution of grievances through interaction between parents of [children with disabilities] and the agencies responsible for educating those children."); *Cudjoe*, 297 F.3d at 1067 ("[W]e reject the argument that exhaustion will be excused because relief is no longer 'available' at the time the plaintiff seeks to file a civil suit if relief was available at the time the alleged injuries occurred. To hold otherwise would transform the IDEA's exhaustion requirement into a

'hollow gesture.'"); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d at 1379 ("[P]laintiff argues that exhaustion of administrative remedies is not required in this case because she no longer attends any of the defendant school districts. . . . If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory. Permitting parents to avoid the requirements of the IDEA through such a 'back door' would not be consistent with the legislative intent of the IDEA."). Similarly, Petitioners' decision to leave Respondents' schools does not make IDEA remedies unavailable. IDEA relief was available to Petitioners for the entire two and a half years that E.F. attended Respondents' schools while the dispute persisted. Petitioners simply chose not to pursue such relief.

IV. This Case Does Not Warrant Review.

The alleged "conflict" among circuits does not warrant review by this Court. The defendant school district in *Payne* sought certiorari in 2011, claiming that the Ninth Circuit's decision marked a departure from every circuit that decided the issue, thereby by creating a circuit split. This Court presumably was not convinced that *Payne* created a circuit split, or that a significant enough legal issue was presented, and the Petition was denied.

Since that 2011 Petition was denied, only a few circuits have been confronted with the issue of exhaustion under the IDEA. Every circuit since *Payne* has examined the gravamen of the plaintiffs' claim to determine whether exhaustion was required, as required by the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits – and the Ninth Circuit's decision in *Payne*. No circuit since *Payne* has relied exclusively on the relief requested in the pleadings to determine whether exhaustion was required. Nor has any circuit allowed a plaintiff to artfully plead money damages only to avoid the IDEA's exhaustion requirement. In sum, no Circuit Court cases have relied on *Payne* in the manner Petitioner interprets this decision. This confirms that Petitioner's interpretation of *Payne* makes it an outlier, and not a legal trend dividing the circuits.

Any alleged conflict *Payne* causes is likely to be resolved by the Ninth Circuit. In 2014, the Ninth Circuit acknowledged that fundamentally important portions of the *Payne* decision were improperly decided, overruling the case in substantial part. *See Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 403 (2014). Part of the *Payne* opinion included a ruling by the Ninth Circuit that IDEA exhaustion under §1415(l) was not jurisdictional. Like the so-called "relief centered" approach, the *Payne* decision appeared to be the only Circuit Court decision to hold that IDEA exhaustion was not jurisdictional. *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 784 (10th Cir. 2013). In 2014, the Ninth

Circuit found that it had wrongly decided *Payne*, and overruled that portion of the decision. *See Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). It is only a matter of time before the Ninth Circuit corrects this interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EHLENA FRY, a minor, by her next friends, STACY FRY and BRENT FRY,

Plaintiff,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Defendants.

Case No. _____

COMPLAINT AND JURY DEMAND

COMPLAINT AND JURY DEMAND

(Filed Dec. 17, 2012)

INTRODUCTION

1. This disability rights case is filed by a young girl with cerebral palsy against her former school district and intermediate school district for refusing to allow her to bring a trained service dog with her to school to assist her with mobility and balance problems and increase her independence.

2. Plaintiff Ehlena Fry is an eight-year-old girl who was born with spastic quadriplegic cerebral palsy, the most severe form of cerebral palsy. Spastic quadriplegic cerebral palsy affects Ehlena's legs,

arms, and body and significantly limits her motor skills and mobility. She is not impaired cognitively, but needs physical assistance in her daily activities.

3. In 2009, when Ehlena was five years old, Ehlena's parents, with the generous help of families at Ehlena's elementary school and throughout the community, obtained a service dog prescribed by their pediatrician to help her to live as independently as possible. Together the family and the dog, a Goldendoodle named "Wonder," trained at a facility in Ohio for service animals and their handlers. Wonder was certified and trained to help Ehlena with mobility and to assist her in daily activities, including retrieving dropped items, opening and closing doors, turning on and off lights, taking her coat off, using the bathroom, and helping bridge social barriers.

4. It was the pediatrician's and the family's intention for Wonder to accompany Ehlena at all times to facilitate her independence and to ensure that Ehlena and Wonder would bond after the training. However, despite knowing of the Frys' plans, Defendants refused to allow Ehlena to attend school with Wonder.

5. As a result, Ehlena was forced to attend school without Wonder from October 2009 to April 2010. After Ehlena's lawyers met with the school district's counsel, Ehlena was allowed to bring Wonder to school for a "trial period" at the end of the school year. However, the administration refused to allow Ehlena to use Wonder as a service dog during

that period; rather, the dog was required to remain in the back of the room during classes, was forbidden from assisting Ehlena with many tasks he had been specifically trained to do, and was forbidden from accompanying and assisting Ehlena during recess, lunch, computer lab, library time and other activities.

6. Following the trial period, the administration refused to modify the school's policies to accommodate Ehlena's disabilities as required by law and even refused to recognize Wonder as a service dog. Consequently, Ehlena's parents removed her from school and filed a complaint with the Office of Civil Rights (OCR) at the United States Department of Education. While waiting for an OCR ruling, Ehlena was homeschooled using an online curriculum and she had very limited contact with children her own age.

7. Two years later, in May 2012, OCR issued a disposition letter finding that Ehlena's school district, Defendant Napoleon Community Schools, and Defendant Jackson Intermediate School District had violated Ehlena's rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and the regulations implementing these civil right [sic] laws.

8. In order to settle the complaint with OCR, the school district agreed to take Ehlena back with Wonder, but the district refused to accept the factual findings or legal conclusions of OCR. After Ehlena's father, Brent Fry, spoke with Pamela Barnes, the principal, to discuss Ehlena returning to school with

Wonder, the parents had serious concerns that the administration would resent Ehlena and make her return to school difficult. Accordingly, they found a public school in Washtenaw County where the staff welcomed Ehlena and Wonder and saw their presence as an opportunity to promote inclusion of students with disabilities within the school. Ehlena now attends the school in Washtenaw County.

9. Ehlena, through her parents, brings this action against the Napoleon Community Schools and Jackson Intermediate School District, and Pamela Barnes, pursuant to the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Michigan Persons with Disabilities Civil Rights Act. She seeks a declaration that her rights were violated and damages for the injuries she suffered as a result of the denial of her civil rights.

JURIDICTION [sic] **AND VENUE**

10. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343 because this is a civil action seeking redress for the deprivation of rights secured by federal law – specifically Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 794(a), and 42 U.S.C. § 1983. Jurisdiction over the supplemental state-law claim is proper under 28 U.S.C. § 1367.

11. Venue is proper in that the complained of actions took place in, and the parties reside in, Jackson County, which is in the Eastern District of Michigan.

PARTIES

12. Plaintiff Ehlena Fry is a minor who resides in Jackson County, within the Eastern District of Michigan. She brings this action through her parents and next friends, Stacy and Brent Fry, who also reside in Jackson County.

13. Defendant Napoleon Community Schools (the "District") is a public school district and a body corporate organized under the laws of Michigan, located in Jackson County.

14. Defendant Jackson County Intermediate School District ("ISD") is a public intermediate school district organized under the laws of Michigan, located in Jackson County.

15. Pamela Barnes is the principal of Ezra Eby Elementary School.

16. During the 2009-2010 school year, Plaintiff attended Ezra Eby Elementary School, which is part of the Defendant Napoleon Community Schools and Defendant Jackson Intermediate School District.

FACTUAL ALLEGATIONS

17. Plaintiff incorporates the preceding paragraphs.

18. Ehlena was born in 2004 and is now eight years old.

19. Ehlena was born with spastic quadriplegic cerebral palsy, which is the most severe form of cerebral palsy. Spastic quadriplegic cerebral palsy affects Ehlena's legs, arms, and body and significantly limits her motor skills and mobility.

20. Ehlena is not cognitively impaired, but she also has been diagnosed with ADHD inattentive type and seizure disorder.

21. Ehlena is a person with a disability as that term is defined by Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the Michigan Persons with Disabilities Civil Rights Act.

22. On or about May 2008, Ehlena's pediatrician wrote a prescription for a service dog to assist her in her everyday activities.

23. Before enrolling her in the Ezra Eby Elementary School kindergarten program for the 2009-2010 school year, Ehlena's parents informed the school administration that they planned to obtain a service dog for Ehlena to assist her in her everyday activities. Defendants led Ehlena's parents to believe that the service dog could attend school with Ehlena.

24. During the 2008-2009 school year, the surrounding communities sponsored a successful fundraisers [sic] to raise a portion of the approximately

$13,000 to help Ehlena's family pay for the training of a service dog, "Wonder."

25. Wonder is a Goldendoodle, a cross between a Golden Retriever and a Poodle. Goldendoodles are known for being intelligent, affectionate, human-oriented dogs. Because Goldendoodles have a no-shedding or low-shedding coat, they are generally tolerable to people with allergies to dogs.

26. In the fall of 2009, Ehlena and her family trained with Wonder at the service animal training facility "4 Paws for Ability" in Ohio, a non-profit agency specializing in placing service dogs.

27. Wonder is a specially trained and certified service dog and assists Ehlena in a number of ways, including, but not limited to, retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, helping her transfer to and from the toilet.

28. Wonder enables Ehlena to develop independence and confidence and helps her to bridge social barriers.

29. While Ehlena must have a handler assist her with Wonder while she is young, she will be able to handle Wonder on her own when she is older and stronger.

30. In October 2009, Wonder received his certification and returned to Michigan with Ehlena and her family.

31. However, much to the Frys' surprise and disappointment, Defendants told them that Ehlena could not bring Wonder to school.

32. Jackson County Intermediate School District Director Richard Rendell and Pamela Barnes formalized the decision to reject the request to bring Wonder to school in a specially convened Individualized Education Plan ("IEP") meeting on January 7, 2010.

33. The IEP states that Ehlena's parents "requested a service dog for their daughter to enhance her independence" and that the request was denied as Ehlena's "physical and academic needs are being met through the services/programs/accommodations of the IEP."

34. The Frys, through pro bono counsel, negotiated an agreement with Defendants under which Ehlena was allowed to bring Wonder to school for a 30-day "trial period" that began on April 12, 2010 and was extended through the end of the school year.

35. However, Defendants refused to allow Ehlena to use Wonder as a service dog during the trial period; rather, the dog was required to remain in the back of the room during classes, and was forbidden from assisting Ehlena with many tasks he had been specifically trained to do.

36. Defendants also refused to allow Wonder to accompany and assist Ehlena during recess, lunch, computer lab and library.

37. Defendants further prohibited Ehlena from participating in other activities with Wonder such as walking the track during "Relay for Life," a school play and "field day."

38. Following the trial period, Defendants refused to modify the school's policies to accommodate Ehlena's disabilities for the next school year as required by law.

39. Defendants refused to extend the areas where Wonder would be allowed to assist Ehlena and refused to allow Wonder to perform all the tasks for which he had been trained.

40. Defendants even refused to recognize Wonder as a service dog.

41. As a result, Ehlena's parents removed Ehlena from Ezra Eby Elementary School and filed a complaint with the Office of Civil Rights (OCR) at the United States Department of Education.

42. While waiting for an OCR ruling, Ehlena was homeschooled using an online curriculum for two years.

43. In addition to her duties raising Ehlena and her siblings, Stacy Fry took on the added educational responsibilities to ensure that Ehlena was receiving the appropriate curriculum.

44. Stacy Fry's role as Ehlena's teach [sic] was particularly challenging and frustrating because she

did not have specific training in teaching methods that Ehlena required.

45. Ehlena had very limited contact with children her own age while she was being homeschooled.

46. Two years later, in May 2012, OCR issued a 14-page disposition letter to the school finding that Ehlena's school district and intermediate school district had violated Ehlena's rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and the federal regulations implementing the laws. (See 5/3/12 Disposition Letter and Resolution Agreement, attached as Exhibit A)

47. In order to settle the complaint with OCR, the school district entered into a six-page resolution agreement in which it agreed to take Ehlena back with Wonder and allow Wonder to accompany and assist Ehlena throughout the school. However, the district refused to accept the factual findings or legal conclusions of OCR. (*See* Exhibit A)

48. After Brent Fry spoke with the [sic] Pamela Barnes in the summer of 2012 to discuss Ehlena returning to school with Wonder in the fall, Ehlena's parents had serious concerns that the administration would resent Ehlena and make her return to school difficult.

49. Accordingly, they found a public school in Washtenaw County, where the principal and staff enthusiastically welcomed Ehlena and Wonder and saw their presence as an opportunity to promote

inclusion of students with disabilities within the school.

50. Ehlena now attends a Washtenaw County school and is again able to interact with children her own age.

51. Defendants' refusal to accommodate Ehlena's disabilities has caused her harm, including, but not limited to:

a. denial of equal access to Defendants' facilities, programs, and services;

b. denial of the use of Wonder as a service dog at school from October 2009 to June 2010;

c. interference with Ehlena's ability to form a bond with Wonder from October 2009 to June 2010, which compromised Wonder's ability to effectively assist Ehlena outside of school;

d. denial of the opportunity to interact with other students at Ezra Eby Elementary School during the 2010-2011 and 2011-2012 school years when she was homeschooled due to the refusal of Defendants to use Wonder as a service dog at school;

e. loss of ability to interact with students at Ezra Eby Elementary School and stress caused by leaving the Napoleon Community Schools and enrolling in a new school in a different county for the 2012-2013 academic year; and

f. emotional distress and pain, embarrassment, mental anguish, inconvenience, and loss of enjoyment

of life resulting from Defendants' refusal to reasonably accommodate her as a person with a disability who uses a service animal.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF AGAINST THE NAPOLEON COMMUNITY SCHOOLS AND JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT SECTION 504 OF THE REHABILITATION ACT OF 1973

52. Plaintiff incorporates the preceding paragraphs.

53. Section 504 of the Rehabilitation Act of 1973 ("Section 504") and its implementing regulations provide, "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4(a).

54. Among other requirements, entities subject to Section 504 must provide equal opportunity to qualified persons with disabilities to participate or benefit from any aid, benefit, or service they make available. 34 C.F.R. § 104.4(b)(1)(ii).

55. Entities subject to Section 504 must avoid otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege,

advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 C.F.R. § 104.4(b)(1)(vii).

56. An "individual with a disability" is defined by reference to the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 705(20)(B); referencing 42 U.S.C. § 12102(1). A person has a disability under Section 504 if they have a physical or mental impairment that substantially limits one or more of their major life activities. 42 U.S.C. § 12102(1).

57. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, standing, lifting, bending, speaking, learning, and working. 42 U.S.C. § 12102(2)(A). Major life activities also include the operations of major bodily function. 42 U.S.C. § 12102(2)(B).

58. A "qualified individual with a disability" is one who, with or without reasonable accommodations for their disability, meets essential eligibility requirements to receive services from or participate in the programs or activities of a recipient of Federal financial assistance. *See* 29 U.S.C. § 794(a).

59. A "program or activity" includes local education agencies, public boards of education, and school systems. 29 U.S.C. § 794(b)(2)(B), referencing 20 U.S.C. § 7801(26). A "recipient of federal financial assistance" is a public or private agency or other entity to which Federal financial assistance is extended directly or through another recipient. 34 C.F.R. § 104.3(f).

60. Ehlena is an individual having physical impairments, including but not limited to, spastic quadriplegic cerebral palsy, and although Ehlena is not cognitively impaired, she also has been diagnosed with ADHD inattentive type and seizure disorder.

61. Ehlena's impairments affect her major life activities of caring for herself, and performing manual tasks. *See* 42 U.S.C. § 12102(2).

62. Ehlena is an individual with disabilities as defined by Section 504. 29 U.S.C. § 705(20)(B); referencing 42 U.S.C. § 12102(1).

63. Ehlena is an otherwise qualified individual with disabilities who meets essential eligibility requirements to receive services from or participate in the programs or activities of the District and ISD. *See* 42 U.S.C. § 12131(2); 29 U.S.C. § 794(a).

64. Ehlena attended and received educational services from the District and ISD.

65. The District and ISD are a "program[s] or activit[ies]" subject to Section 504. *See* 29 U.S.C. § 794(b)(2)(B), referencing 20 U.S.C. § 7801(26).

66. The District and ISD are recipients of federal financial assistance as they receive federal funds.

67. The District and ISD are entities subject to the non-discrimination requirements of Section 504. *See* 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4.

68. The District's and ISD's refusal to allow Wonder to act as a service dog for Ehlena and to permit his access in the instructional setting discriminated against Ehlena as a person with disabilities who uses a service animal by denying her equal access and otherwise limiting her access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers. *See* 34 C.F.R. §§ 104.4(a), 104.4(b)(ii) and (iv).

69. The District's and ISD's refusal to recognize Wonder as a service dog and to permit his access in the instructional setting was illegal disability-based discrimination that violated Section 504 of the Rehabilitation Act of 1973.

70. The District's and ISD's discrimination was intentional as the District's and ISD's knowingly refused to recognize Wonder as a service dog despite having full knowledge that Ehlena qualified as an individual with disabilities and relied upon Wonder to obtain equal access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers.

71. As a proximate cause of these violations of Section 504, Ehlena has suffered harm as set forth above.

SECOND CLAIM FOR RELIEF AGAINST THE NAPOLEON COMMUNITY SCHOOLS AND JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT TITLE II OF THE AMERICANS WITH DISABILITIES ACT

72. Plaintiff incorporates all prior allegations.

73. Title II of the ADA and its implementing regulations forbid public entities, including local educational agencies, to exclude or deny people with disabilities the benefits of its services, programs, or activities, or to discriminate based on disability. 42 U.S.C. § 12132; 28 C.F.R. §§ 35.104 & .130(a).

74. Prohibited disability-based discrimination by public entities includes the failure to provide qualified individuals with disabilities an equal opportunity to participate in or benefit from aids, benefits, or services or "otherwise limit" a qualified individual with a disability in the enjoyment of any right, privilege, aid, benefit, or service. 28 C.F.R. § 35.130(b)(1)(ii) & (vii). Prohibited discrimination additionally includes the failure to make reasonable modifications as necessary to avoid discrimination against an individual based on their disability. 28 C.F.R. § 35.130(b)(7).

75. An "individual with a disability" is one who has a physical or mental impairment that substantially limits one or more of their major life activities. 42 U.S.C. § 12102(1).

76. Major life activities include, but are not limited to, caring for oneself, performing manual

tasks, walking, standing, lifting, bending, speaking, learning, and working. 42 U.S.C. § 12102(2)(A). Major life activities also include the operations of major bodily function. 42 U.S.C. § 12102(2)(B).

77. A "qualified individual with a disability" is one who, with or without reasonable accommodations for her disability, meets essential eligibility requirements to receive services from or participate in the programs or activities of the public entity. 42 U.S.C. § 12131(2).

78. Ehlena is an individual having physical impairments, including but not limited to, spastic quadriplegic cerebral palsy, and although Ehlena is not cognitively impaired, she has been diagnosed with ADHD inattentive type and seizure disorder.

79. Ehlena's impairments affect her major life activities including caring for herself, walking, balancing, and performing manual tasks. See 42 U.S.C. § 12102(2)(A).

80. Ehlena is an otherwise qualified individual with disabilities who meets the essential eligibility requirements to receive services from or participate in the programs or activities of the District and ISD. *See* 42 U.S.C. § 12131(2).

81. The District and ISD are public entities forbidden to discriminate based on disability. *See* 42 U.S.C. § 12132.

82. The District's and ISD's deliberate refusal to recognize Wonder as a service dog and to permit his

access in the instructional setting, discriminated against Ehlena as a person with disabilities who uses a service animal by denying her equal access and otherwise limiting her access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers. *See* 28 C.F.R. §§ 35.130(a), .130(b)(1)(ii) & (vii).

83. The District and ISD illegally discriminated against Ehlena in their continuing refusal to reasonably accommodate Ehlena as a person with disabilities who uses a service animal. *See* 28 C.F.R. § 35.130(b)(7).

84. The ADA defines a service animal as:

> . . . any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

See 28 C.F.R. § 36.104.

85. The ADA further requires public entities to modify their "policies, practices, or procedures to permit the use of a service animal by an individual with a disability." *See* 28 C.F.R. § 36.302(c).

86. Wonder is a dog that was individually trained to perform tasks for Ehlena's benefit. The tasks that

Wonder has been trained to perform are uniquely suited to Ehlena's needs as a person with a disability.

87. The District's and ISD's refusal to grant Ehlena's requested accommodations was illegal disability-based discrimination that violates Title II of the Americans with Disabilities Act of 1990.

88. The District's and ISD's discrimination was intentional as the District and ISD knowingly refused to accommodate Ehlena despite having full knowledge that she is a qualified individual with disabilities and that she relied upon Wonder as a service dog under the ADA to obtain equal access to the District's and ISD's facilities, programs, and services as compared to her non-disabled, non-service animal user peers.

89. As a proximate cause of these violations of Title II of the Americans with Disabilities Act, Ehlena has suffered harm as set forth above.

THIRD CLAIM FOR RELIEF AGAINST THE NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

90. Plaintiff incorporates all prior allegations.

91. The Michigan Persons with Disabilities Civil Rights Act (the "Michigan Act") prohibits educational institutions to exclude or deny people with

disabilities the full benefits of their programs, activities, and facilities or to discriminate based on disability. M.C.L. § 37.1101 *et seq.*

92. The District and ISD are educational institutions as the term is defined in M.C.L. § 37.1401.

93. Barnes is an agent of an educational system as the term is defined in M.C.L. § 37.1401.

94. Ehlena is a person with a disability as that term is defined in the Michigan Act because she has physical impairments, including but not limited to, spastic quadriplegic cerebral palsy, and although Ehlena is not cognitively impaired, she also has been diagnosed with ADHD inattentive type and seizure disorder.

95. Ehlena's disabilities substantially limit one or more of her life activities and is unrelated to her ability to use and benefit from Defendants' educational activities, programs, and facilities.

96. Despite her disabilities, Ehlena is otherwise qualified to use and benefit from the District's and ISD's educational activities, programs, and facilities.

97. Defendants' refusal to recognize Wonder as a service dog and to permit his access in the instructional setting, discriminated against Ehlena as a person with disabilities who uses a service animal by denying her equal access and otherwise limiting her access to Defendants' facilities, programs, and services as compared to her non-disabled, non-service animal user peers. M.C.L. § 37.1402.

98. As a proximate cause of these violations of the Michigan Persons with Disabilities Act, Ehlena has suffered harm as set forth above.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

a. Enter judgment in her favor against Defendants;

b. Issue a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act and the Michigan Persons with Disabilities Civil Rights Act;

c. Award her damages in an amount to be determined at trial;

d. Award attorneys' fees pursuant to the Rehabilitation Act, the Americans with Disabilities Act, 42 U.S.C. § 1988 and the Michigan Persons with Disabilities Civil Rights Act; and

e. Grant any other relief this Court deems appropriate.

JURY DEMAND

Plaintiff respectfully requests a jury trial on all issues triable to a jury.

Respectfully submitted,

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Dated: December 17, 2012

[Exhibit Omitted]

RELEVANT STATUTES AND REGULATIONS

20 U.S.C. § 1400. Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because –

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities,

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities,

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of assessment of, and provision of services for,

our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population,

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease,

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes

The purposes of this chapter are –

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

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20 U.S.C. § 1401. Definitions

Except as otherwise provided, in this chapter:

(1) Assistive technology device

(A) In general

The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

(2) Assistive technology service

The term "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes –

(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for such child, or, where appropriate, the family of such child; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers,

or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

(3) Child with a disability

(A) In general

The term "child with a disability" means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child –

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development;

cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

(4) Core academic subjects

The term "core academic subjects" has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801].

(5) Educational service agency

The term "educational service agency" –

(A) means a regional public multiservice agency –

(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and

(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and

(B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.

(6) Elementary school

The term "elementary school" means a nonprofit institutional day or residential school, including

a public elementary charter school, that provides elementary education, as determined under State law.

(7) Equipment

The term "equipment" includes –

(A) machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house such machinery, utilities, or equipment; and

(B) all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published, and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(8) Excess costs

The term "excess costs" means those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school year for an elementary school or secondary school student, as may be appropriate, and which shall be computed after deducting –

(A) amounts received –

(i) under subchapter II;

(ii) under part A of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. 6311 et seq.]; and

(iii) under parts A and B of title III of that Act [20 U.S.C.A. § 6811 et seq. and 20 U.S.C.A. § 6891 et seq.]; and

(B) any State or local funds expended for programs that would qualify for assistance under any of those parts.

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(10) Highly qualified

(A) In general

For any special education teacher, the term "highly qualified" has the meaning given the term in section 9101 of the Elementary

and Secondary Education Act of 1965 [20 U.S.C.A. § 7801], except that such term also –

(i) includes the requirements described in subparagraph (B); and

(ii) includes the option for teachers to meet the requirements of section 9101 of such Act by meeting the requirements of subparagraph (C) or (D).

(B) Requirements for special education teachers

When used with respect to any public elementary school or secondary school special education teacher teaching in a State, such term means that –

(i) the teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the term means that the teacher meets the requirements set forth in the State's public charter school law;

(ii) the teacher has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) the teacher holds at least a bachelor's degree.

(C) Special education teachers teaching to alternate achievement standards

When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under the regulations promulgated under section 1111(b)(1) of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6311(b)(1)], such term means the teacher, whether new or not new to the profession, may either –

(i) meet the applicable requirements of section 9101 of such Act [20 U.S.C.A. § 7801] for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

(ii) meet the requirements of subparagraph (B) or (C) of section 9101(23) of such Act as applied to an elementary school teacher, or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.

(D) Special education teachers teaching multiple subjects

When used with respect to a special education teacher who teaches 2 or more core

academic subjects exclusively to children with disabilities, such term means that the teacher may either –

> (i) meet the applicable requirements of section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801] for any elementary, middle, or secondary school teacher who is new or not new to the profession;
>
> (ii) in the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering multiple subjects; or
>
> (iii) in the case of a new special education teacher who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under section 9101(23)(C)(ii) of such Act, which may include a single, high objective uniform State standard of evaluation covering

multiple subjects, not later than 2 years after the date of employment

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this section or subchapter shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.

(F) Definition for purposes of the ESEA

A teacher who is highly qualified under this paragraph shall be considered highly qualified for purposes of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.].

(11) Homeless children

The term "homeless children" has the meaning given the term "homeless children and youths" in section 11434a of Title 42.

(12) Indian

The term "Indian" means an individual who is a member of an Indian tribe.

(13) Indian tribe

The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native

village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)).

(14) Individualized education program; IEP

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

(15) Individualized family service plan

The term "individualized family service plan" has the meaning given the term in section 1436 of this title.

(16) Infant or toddler with a disability

The term "infant or toddler with a disability" has the meaning given the term in section 1432 of this title.

(17) Institution of higher education

The term "institution of higher education" –

(A) has the meaning given the term in section 1001 of this title; and

(B) also includes any community college receiving funding from the Secretary of the Interior under the Tribally Controlled Colleges and Universities Assistance Act of 1978,

(18) Limited English proficient

The term "limited English proficient" has the meaning given the term in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801].

(19) Local educational agency

(A) In general

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(B) Educational service agencies and other public institutions or agencies

The term includes –

(i) an educational service agency; and

(ii) any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(C) BIA funded schools

The term includes an elementary school or secondary school funded by the Bureau of

Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this chapter with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs,

(20) Native language

The term "native language", when used with respect to an individual who is limited English proficient, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child.

(21) Nonprofit

The term "nonprofit", as applied to a school, agency, organization, or institution, means a school, agency, organization, or institution owned and operated by 1 or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(22) Outlying area

The term "outlying area" means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(23) Parent

The term "parent" means –

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(D) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

(24) Parent organization

The term "parent organization" has the meaning given the term in section 1471(g) of this title,

(25) Parent training and information center

The term "parent training and information center" means a center assisted under section 1471 or 1472 of this title,

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective,

and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children,

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

(27) Secondary school

The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(28) Secretary

The term "Secretary" means the Secretary of Education.

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(30) Specific learning disability

(A) In general

The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included

Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included

Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of

environmental, cultural, or economic disadvantage.

(D) State

The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(32) State educational agency

The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(33) Supplementary aids and services

The term "supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 1412(a)(5) of this title.

(34) Transition services

The term "transition services" means a coordinated set of activities for a child with a disability that –

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement

of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(35) Universal design

The term "universal design" has the meaning given the term in section 3002 of Title 29.

(36) Ward of the State

(A) In general

The term "ward of the State" means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.

(B) Exception

The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph (23).

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34 C.F.R. § 300.34 Related services.

(a) General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

(b) Exception; services that apply to children with surgically implanted devices, including cochlear implants.

(1) Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

(2) Nothing in paragraph (b)(1) of this section –

(i) Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (as listed in paragraph (a) of this section) that are determined by the IEP

Team to be necessary for the child to receive FAPE,

(ii) Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

(iii) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in § 300.113(b).

(c) Individual related services terms defined. The terms used in this definition are defined as follows:

(1) Audiology includes –

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) Early identification and assessment of disabilities in children means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) Interpreting services includes –

(i) The following, when used with respect to children who are deaf or hard of hearing: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C – Print, and TypeWell; and

(ii) Special interpreting services for children who are deaf-blind.

(5) Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(6) Occupational therapy –

(i) Means services provided by a qualified occupational therapist; and

(ii) Includes –

(A) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.

(7) Orientation and mobility services –

(i) Means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes teaching children the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(8)(i) Parent counseling and training means assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

(9) Physical therapy means services provided by a qualified physical therapist.

(10) Psychological services includes-

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(11) Recreation includes –

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(12) Rehabilitation counseling services means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

(13) School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.

(14) Social work services in schools includes –

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(15) Speech-language pathology services includes –

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(16) Transportation includes –

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

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34 C.F.R. § 300.39 Special education.

(a) General.

(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including –

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section –

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) Individual special education terms defined. The terms in this definition are defined as follows:

(1) At no cost means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) Physical education means –

(i) The development of –

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – –

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) Travel training means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with

disabilities who require this instruction, to enable them to –

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

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34 C.F.R. § 300.43 Transition services.

(a) Transition services means a coordinated set of activities for a child with a disability that –

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.